In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 649

JULIAN BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was indicted on an eight-count indictment, of which four counts charged willful attempts to evade his federal income tax for the years 1959 through 1962, in violation of Section 7201 of the Internal Revenue Code, and four counts charged willful making and subscribing of false tax returns for each of those years, in violation of Section 7206 (1) of the Code (Pet. App. 1, 7-8). Pursuant to a negotiated plea, petitioner pleaded guilty to the Sec-

tion 7206(1) counts and, at the time of sentencing, the Section 7201 counts were dismissed (Pet. App. 1, 8). Petitioner was sentenced to $14,000 in fines on all counts and concurrent sentences of three years' probation on three counts; on the fourth count, he received a three-year sentence to be suspended on the condition that he serve ninety days in a jail-type institution and thereafter be placed on probation for three years (Pet. 11). Each of the four violations carried a maximum penalty of a $5,000 fine and a three-year jail sentence. The court of appeals affirmed the judgment on July 14, 1970 (Pet. App. 1-5) and denied a petition for rehearing on August 4, 1970 (Pet. 2). The petition for a writ of certiorari was filed on September 4, 1970, and is out of time under Rule 22(2) of this Court.

Petitioner challenges the validity of his sentence, asserting that it was based on incorrect or misleading information in the pre-sentence report and relying on *Townsend* v. *Burke*, 334 U.S. 736; *Baker* v. *United States*, 388 F. 2d 931, 932-933 (C.A. 4); and *United States* v. *Myers*, 374 F. 2d 707 (C.A. 3). Petitioner contends that the report was prejudicially misleading because it contained information relating to the four dismissed tax evasion counts and opinion statements by the investigating Treasury agent. These matters were canvassed in connection with petitioner's motion for reduction of sentence in the district court, and there is no issue warranting plenary consideration in this Court.

After the hearing on the motion to reduce, the trial judge stated (Pet. 14-15) that in sentencing petition-

er, he had not considered the information relating to the dismissed evasion counts. And as to the attack upon the facts asserted in the Treasury agent's investigative report we note that petitioner had an opportunity at the Rule 35 hearing to present evidence refuting, or in mitigation of, the pre-sentence report, but did not do so.

In *Townsend* v. *Burke*, *supra*, *Baker* v. *United States*, *supra*, and *United States* v. *Myers*, *supra*, the courts vacated sentences grounded on mistaken information regarding the offender's past criminal record. In contrast, the trial judge below noted that petitioner had no prior criminal record (Pet. 14) and because of this moderated the sentence imposed on petitioner. *Townsend* and the line of decisions following it have no application to the present case. In truth, the petition attacks the severity of the petitioner's sentence, not the facts considered by the trial judge in assessing the sentence. As stated above, the trial judge relied on only designated portions of the pre-sentence report, the accuracy of which petitioner did not rebut. The trial judge acted well within the permissible range of his discretion in sentencing petitioner and subsequently refusing to alter that sentence. See, *e.g.*, *Zaffarano* v. *Blackwell*, 383 F. 2d 719, 721 (C.A. 5).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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